In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1461

JAY RICHARD BERGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A2) is reported at 420 F. 2d 681.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1969. A petition for rehearing was denied on February 25, 1970. The time to file a petition for a writ of certiorari was extended to April 26, and the petition was filed on April 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was a basis in fact for petitioner's I–A selective service classification.

387-211—70

STATEMENT

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of wilfully refusing to submit to induction into the Armed Forces as ordered by his local draft board, in violation of 50 U.S.C. App. 462(a). He was sentenced to imprisonment for three years. The court of appeals affirmed *per curiam* (Pet. App. A).

The only question at trial was whether there was any factual basis for the Board's action (Tr. Vol. II, p. 8). The Board's complete file was introduced in evidence and is on file with the Clerk of this Court (Tr. Vol. III, p. 9).

The file shows that the petitioner first registered for the draft in 1961 (p. 1). He was classified I–A in November 1963 (p. 11). In February 1964, the electronics firm for which he worked requested that he be given a student deferment since he was on a work-study program and was working on "portions of the design of numerous systems relative to our national defense and national space programs" (p. 24). In September 1966, his employer asked that petitioner be considered for a II–A classification since he needed six credits to complete his B.S. degree and wished to work full time, studying at night. The request noted that if petitioner could not be reclassified, he would return to school full time and thus would not be available for the draft. The employer stated that petitioner's research resulted in sophisticated systems used in advanced and sensitive military and space

programs (pp. 42–46). Petitioner was classified I–A in September 1966, and the classification was affirmed on March 23, 1967, on appeal by the employer (p. 53).

On April 7, 1967, petitioner asked for a conscientious objector form (p. 54). In the completed questionnaire, he stated that his beliefs were acquired through the natural processes of growth (p. 57); that he was without any need for a creed; and that he regarded his responsibility "first to life," then to the human race and himself (p. 60). Petitioner pointed to the fact that he was an electronics engineer as demonstrating his creative thinking. He said he made public expression of his views only to small groups (p. 57). After a request for a personal appearance, petitioner, in August 1967, submitted a letter from the Religious Society of Friends which noted that he had attended Quaker meetings for "more than a year," and that in discussion he appeared to be a sincere objector to war (pp. 71–72). Another reference stated that petitioner had refused to work on "projects having direct military applications" (p. 79). After a personal appearance on September 11, 1967, at which the board questioned petitioner about the lateness of his assertion of conscientious objector status, the local board classified petitioner I–A (p. 81). The report of the interview also states that petitioner submitted a letter from his employer and the board told him that the board could not grant a II–A classification (p. 81, see also pp. 87–88). The appeal board upheld the I–A classification.

ARGUMENT

The court below properly held that there was a basis in fact for the I–A classification.

1. The occupational deferment was properly denied by the local board in 1966 and by the appeal board in March 1967. The employer's letter itself showed that petitioner was not irreplaceable since the employer stated that petitioner would go to school full time if he did not get an occupational deferment. When petitioner made his personal appearance before the local board on his conscientious objector claim, the appeal board had already affirmed the denial of an occupational deferment. The local board therefore correctly told petitioner that it could not give him an occupational deferment. Moreover, the letter submitted by petitioner's then employer (p. 87) stated only that petitioner could not easily be replaced.

2. The facts before the board also warranted the conclusion that petitioner's late claim of conscientious objection was not sincere. He was not, apparently, averse to having his work described as in the interest of national defense while he was seeking an occupational deferment. And his participation in Quaker activities, said to have begun about a year before August 1967, coincided rather closely with the denial of his employer's request for occupational deferment.[1]

The fact that the draft board did not explicitly set forth the reasons for its determination is immaterial where, as here, the basis in fact clearly appears from

[1] In his conscientious objector form, filed in April 1967, petitioner did not list the Quakers in reply to a question as to organizational affiliations.

the file. The situation here is distinguishable from that in *United States* v. *Haughton*, 413 F. 2d 736 (C.A. 9), where the record did not indicate any reason for denial of the classification.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MICHAEL G. KELLY,
Attorneys.

JUNE 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970